

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 12,213

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Appeal of)

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INTRODUCTION

The petitioner appeals a decision by the Department of Social Welfare terminating day care assistance under the Reach Up program. The issue is whether the petitioner's child is still "dependent" upon her as that term is used in the ANFC statutes and regulations.

FINDINGS OF FACT

The parties have agreed that the following will constitute the facts for purposes of this appeal:

1. [Petitioner] lives in a trailer park in St. Johnsbury, Vermont with three other people.
2. The other people in [petitioner's] household are:
 - a. [Petitioner]'s daughter, A.H., date of birth 3-15-90. A.H.'s father is absent; his name is S.H.
 - b. [Petitioner]'s daughter, K.W., date of birth
5-26-92;
 - c. M.W., boyfriend of [petitioner] and father of K.W.
3. On August 1, 1993, [petitioner]'s ANFC grant was reduced by the Department of Social Welfare from \$609.00 to \$523.00; K.W. was removed from [petitioner]'s ANFC grant at that time.
4. DSW reduced [petitioner]'s ANFC grant because K.W. is no longer deprived of parental support and care. More specifically, in July, 1993, DSW learned that K.W.'s father, M.W., had returned to the home. M.W. is employed full-time by a lumber company.

5. M.W. earned average wages of \$227.42 per week at the lumber company for the time period in question. This figure is based on wage stubs provided by [petitioner].

6. On June 1, 1993, [petitioner], DSW Reach Up Worker, David Murray, and a NEKCA supervisor met to set up a voluntary Community Work Experience Position for [petitioner] as a receptionist. At that time, Reach Up day-care coverage commenced for [petitioner]'s children, A.H. and K.W.

7. Effective July 31, 1993, DSW terminated [petitioner]'s Reach Up day care for K.W. This action was taken because K.W. is not eligible for ANFC benefits.

ORDER

The Department's decision is affirmed.

REASONS

The Department's regulations guarantee child care assistance to "ANFC assistance groups that are participating in Reach Up or are employed or self-employed and have allowable child care expenses" under certain circumstances.

W.A.M. 2348.1. The Department's regulations also set up criteria for providing assistance to any individual child as follows:

The child requiring care:

- a. is under age 13; or
- b. is age 13 or older and physically or mentally incapable of caring for him-or herself, as verified by the written report of a physician or licensed psychologist; or
- c. is age 13 or older and under court supervision; and
- d. is a member of the caretaker relative's ANFC assistance group or is not a member of the ANFC assistance group solely because he/she is a SSI/AABD recipient or receives foster care benefits under Title IV-E.

NOTE: Child care expenses for other children who are not members of the assistance group may be excluded from gross earnings (see the Other Excluded Income) section of ANFC policy).

W.A.M. § 2348.2(4)

The Department relied on paragraph (4)(d) of the above regulation to deny child care assistance to the petitioner's non-ANFC recipient child, K.W. The petitioner does not disagree that payments to her non-ANFC recipient daughter are barred by the above regulation. Rather, she argues that the eligibility requirement in paragraph (4)(d) cited above was created out of whole cloth by the Department and is not authorized or contemplated by the federal laws and regulations. She argues that paragraph 4(d) is, therefore, invalid and should be struck from the regulation.

The portions of the federal Social Security Act which set standards for ANFC state plans require "that the State has in effect and operation a job opportunities and basic skills training program" which meets certain requirements.

42 U.S.C. § 602(a)(19)(A). The federal law further requires:

that---

(i) the State will (except as otherwise provided in this paragraph or part of this subchapter), to the extent that the program is available in the political subdivision involved and State resources otherwise permit--

(I) require all recipients of aid to families with dependent children in such subdivision with respect to whom the State guarantees child care in accordance with section 602(g) of this title to participate in the program . . .

42 U.S.C. § 602(a)(19)(B)

Section 602(g), provides in turn:

(g) Child care during participation in employment, education, and training; extended eligibility

(1)(A)(i) Each State agency must guarantee child care in accordance with subparagraph (B)⁽¹⁾--

. . .

(II) for each individual participating in an education and training activity (including participation in a program that meets the requirements of subsection (a)(19) of this section and part F of this subchapter) if the State agency approves the activity and determines that the individual is satisfactorily participating in the activity.

The federal statute simply requires each State agency to guarantee child care for each individual satisfactorily participating in an approved education and training activity. The statute does not flesh out any criteria for eligibility of specific children in an individual's household. However, the federal regulations adopted by the Department of Health and Human Services pursuant to these federal statutes enacts more specific requirements as to which children in the household will be assisted. Its regulations focus on eligibility criteria for the child for whom care is guaranteed:

(a) The State IV-A agency must guarantee child care for a dependent child who is: under age 13; physically or mentally incapable of caring for himself or herself, as verified by the State based upon a determination by a physician or a licensed or certified psychologist; or under court supervision (and for a child who would be a dependent child except for the receipt of benefits under Supplemental Security Income under title XVI or foster care under title IV-E), to the extent that such child care is necessary to permit an AFDC eligible family member to--

(1) Accept employment or remain employed; or

(2) Participate in an approved education or training activity under JOBS (including self-initiated

education or training pursuant to Sec. 250.48(a)), or in approved education or training consistent with criteria in the State's Supportive Services plan for approval of education or training in non-JOBS areas.

45 C.F.R. § 255.2

The Department argues that the language in the above regulation which requires that the child be "dependent" authorizes and is synonymous with its language in W.A.M. §

§ 2348.2(4)(d), requiring that the child be a "member of the caretaker relative's ANFC assistance group." The Department points to the definition of "dependent child" found in the section of the Social Security Act authorizing the ANFC program:

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home (other than absence occasioned solely by reason of the performance of active duty in the uniformed services of the United States), or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) at the option of the State, under the age of nineteen and a full-time student in a secondary school (or in the equivalent level of vocational or technical training), if, before he attains age nineteen, he may

reasonably be expected to complete the program of such secondary school (or such training);

42 U.S.C. § 606

The above definition of "dependent" child is specifically incorporated into the federal regulations at 45 C.F.R. § 233.90(c). To be sure, the term "dependent child" is a term of art used throughout the federal and state regulations, including the descriptive name of the program, indicating a child who is both financially and categorically eligible for ANFC benefits. The Department's term "member of the ANFC assistance group", as used in this context, can only be interpreted as meaning a child who is eligible for ANFC. The Department's regulations governing eligibility for ANFC make it clear that the same criteria established to define "dependent child" in the federal statute and regulations are used by the Department to determine an "ANFC eligible" child.⁽²⁾ As such, it is difficult to conclude that the Department's requirements at paragraph (4)(d) of W.A.M. § 2348.2 are inconsistent with or are different from the requirements in the federal regulation at 45 C.F.R. § 255.2(a).

The petitioner argues, however, that the federal regulation at 45 C.F.R. § 255.2(a) should be read in concert with the federal regulations authorizing child care payments⁽³⁾ and the purpose of the JOBS program as expressed in the federal regulations⁽⁴⁾ to mean that any child who is dependent, as that term is generally used in the English language, upon an eligible recipient should get child care assistance. That interpretation is inconsistent with the language in 45 C.F.R. § 255.2(a) which attempts to add certain children (Supplemental Security Income and foster care recipients) back in to the definition of "dependent" who otherwise would be excluded. If "dependent" were defined as broadly as the petitioner suggests, there would be no reason to insert that provision.

The petitioner argues as a policy matter that the term "dependent" should not be equated with "eligible

for ANFC" because such an interpretation would deprive persons of child care assistance who might need it to participate in training and education programs. While such an outcome is certainly in the realm of the possible, the petitioner has put forth no facts in her own case which show that she would be unable to participate in Reach Up if she cannot get assistance for child care with her non-ANFC eligible daughter. The petitioner's daughter is not eligible for ANFC because she is not deprived of parental support. She lives with two non-incapacitated parents, one of whom is employed. The regulation as written presumes that as a "non-dependent" child one or both of her parents could themselves or through payments to others provide her with day care. Given the limited funding available to the Reach Up program and the goal in the federal regulations to "maximize the use of existing resources" and "emphasize accountability for . . . participants" (45 C.F.R. § 250.0(a)(A)and(5)), it is difficult to conclude that Congress and the Department of Human Services wanted to allocate scarce day care assistance payments to children who are not financially or categorically eligible for ANFC.

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1. Subparagraph B discusses the means by which child care may be paid for or arranged.

2. For example, W.A.M. 2330 provides:

Eligibility for ANFC requires establishing that a child is deprived of parental support or care for one of the following reasons and that the income and resources available to the parent in custody of the child and the child are insufficient to meet the child's total needs according to Department standards:

1. Death of a parent;
2. Continued absence of a parent;
3. Physical or mental incapacity of a parent;
4. Unemployment - (ANFC-UP)

...

The language in the above regulation defining ANFC eligibility is very close to that in the federal statute defining "dependent child".

3. The petitioner does not argue in her brief that the federal regulation is inconsistent with or not authorized by the federal statute.

4. The federal regulations set forth the purpose of the JOBS program as follows:

Purpose.

(a) The purpose of the Job Opportunities and Basic Skills Training (JOBS) program under titles IV-A and IV-F of the Social Security Act is to assure that needy families with children obtain the education, training and employment that will help avoid long-term welfare dependence. To accomplish this purpose, the JOBS program is intended to;

(1) Encourage, assist, and require applicants for and recipients of AFDC to fulfill their responsibilities to support their children by preparing for, accepting, and retaining employment;

(2) Provide individuals with the opportunity

to acquire the education and skills necessary to qualify for employment; (3) Provide necessary supportive services, including transitional child care and medical assistance, so that individuals can participate in JOBS and accept employment;

(4) Promote coordination of services at all levels of government in order to make a wide range of services available, especially for individuals at risk of long-term welfare dependency, and to maximize the use of existing resources; and

(5) Emphasize accountability for both participants and service providers.

45 C.F.R. Sec. 250.0